

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD MARTIN SHEARS,

Defendant-Appellant.

UNPUBLISHED

May 24, 2005

No. 252396

Oakland Circuit Court

LC No. 02-186761-FH

Before: Murphy, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (person under thirteen years of age). He was sentenced to three years' probation with thirty days in jail. He appeals as of right and we affirm.

This case arises from allegations that defendant engaged in sexual contact with the complainant in the restroom of a local store. Defendant's only argument on appeal is that he was denied effective assistance of counsel by counsel's failure to call character witnesses, failure to object to impermissible MRE 803A testimony, failure to request a missing evidence jury instruction, and failure to object to testimony regarding defendant's prearrest silence. We find that none of these alleged errors merits reversal.

At trial, the complainant testified that he was in the restroom at a local grocery store when a man allegedly punched him in the groin and solicited him for sex. The complainant did not identify defendant as the man who had hit and solicited him. The complainant's mother confirmed that when her son came out of the restroom he seemed upset and eventually told her what had transpired. She claimed that defendant was the only other person to come out of the restroom, and that he had done so approximately five minutes before her son did. She also admitted, however, that her son told her that he was not sure that defendant was the man who touched him, and that she left that area of the store right after her son came out and thus did not see if anyone came out of the restroom after her son. Defendant testified that he was at the store shopping with his wife at the time the incident occurred and that he had entered the restroom and used the urinal. He claimed that he noticed a person, whom he assume was the complainant, enter the restroom. Defendant testified that he did not look at the complainant, talk to him, or touch him. Defendant testified that he did not know if anyone else was in the restroom, and that he left about thirty or forty seconds after the complainant entered.

During deliberations, the jury sent out a note asking if character witnesses were allowed to testify. The court responded that the jury should consider the evidence heard and the exhibits admitted. The jury thereafter returned a guilty verdict. The trial court denied defendant's subsequent motion for a directed verdict or a new trial, but granted his motion for a *Ginther*¹ hearing. Although the court expressed some concern about counsel's failure to call character witnesses in light of the jury's question during deliberations, it denied defendant's motion for new trial based on alleged ineffective assistance of counsel.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. . . . [A] trial court's findings of fact are reviewed for clear error. . . . Questions of constitutional law are reviewed . . . de novo." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20.

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. [*People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (citations omitted, emphasis in original).]

Defense counsel's performance must be measured against an objective standard of reasonableness. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. [*People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999) (citations omitted).]

We conclude that defendant fails to overcome the strong presumption of effective assistance of counsel. Specifically, we conclude that each challenged decision by counsel was a reasonable trial strategy that we will not second-guess. Counsel testified at the *Ginther* hearing that his trial strategy was three-pronged. First, he wanted to show that the complainant and his mother were mistaken about who had assaulted the complainant. Second, counsel believed that by establishing that the statements made by the complainant and his mother were significantly inconsistent, the jury would have to find there was reasonable doubt of defendant's guilt. Third, counsel was hoping to show that the alleged contact could not have been for sexual gratification.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

As did the trial court, we find defendant's most compelling argument to be that counsel's failure to call character witnesses denied him a substantial defense and was outcome determinative.² Defense counsel testified at the *Ginther* hearing that both he and defendant were concerned that by presenting a character defense, defendant would open the door to the jury hearing that defendant was a Boy Scout leader. Counsel stated that he, defendant, and defendant's wife were concerned about the negative implications this might raise in the jurors' minds. Counsel also considered the fact that he could not control the information that might be elicited in cross-examination of any character witness, and that the jury could become bored if the trial proceeded through a parade of character witnesses. Counsel further testified that the decision not to call any character witnesses was not made until after defendant testified. Counsel determined that defendant had done well under cross-examination and, in his view, additional witnesses were unnecessary.

Under these circumstances, we believe that the decision not to call character witnesses was a strategic one, and it was only apparent in hindsight that this was error. Counsel had a legitimate trial strategy, and his testimony evidenced that he carefully balanced the benefits of calling character witnesses against the identified risks. Even with the jury's apparent concern about character witnesses, we cannot conclude that counsel's performance was objectively unreasonable. Further, "[t]he fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant next argues that counsel's failure to object to inadmissible MRE 803A testimony was ineffective. We disagree. In a child sex abuse case, only the first statement made by the complainant is admissible under MRE 803A (the tender years rule). MRE 803A(4). Any subsequent statement made by the complainant is inadmissible unless the proponent of the statement can find another applicable hearsay exception. In the instant case, counsel testified that one way to raise a reasonable doubt as to defendant's guilt was to highlight the many inconsistent statements made by the complainant shortly after the alleged incident occurred. Indeed, the complainant told his mother he was punched hard, yet described a fairly slight tap to the police officer he first spoke to. The mother later reported that the complainant had told her that he had been grabbed three times in the groin. The complainant's report of what defendant purportedly said at the time of the incident also varied. In his closing, defense counsel focused on these inconsistencies. Objecting to hearsay statements would have been incompatible with counsel's goal of establishing reasonable doubt through impeachment by inconsistent statements. Defense counsel's failure to object was therefore a matter of trial strategy, and will not be second-guessed by this Court.

We also reject defendant's argument that counsel was ineffective for failing to request a missing evidence instruction. This challenge centers on surveillance videotapes made at the store in issue. The information from the store camera was transmitted to a computer hard drive

² We note that the circumstances in the case at hand are distinguishable from cases where counsel failed to discover or present witnesses who could have contradicted the prosecutor's case. See, e.g., *People v Grant*, 470 Mich 477; 684 NW2d 686 (2004).

but, because the store was new, none of the personnel apparently knew how to make a tape from the information on the hard drive. One of the responding officers testified that he attempted to secure store videotapes showing defendant outside the restroom area. The officer testified that he wanted the tape as well and made several requests for copies. Ultimately, the store overwrote the hard drive and the information was lost.

“A defendant is entitled to have produced at trial all evidence bearing on guilt or innocence that is within the prosecutor’s control. Where evidence is suppressed, the proper considerations are whether (1) suppression was deliberate, (2) the evidence was requested, and (3) in retrospect, the defense could have significantly used the evidence.” *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993). Defendant cannot show that he would have been entitled to a missing evidence instruction under these circumstances, because he cannot show that the evidence was ever in the prosecutor’s control, or that the evidence was deliberately lost. Counsel is not ineffective for failing to advocate a meritless position. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Finally, defendant argues that counsel was ineffective for failing to object to testimony regarding his prearrest silence. However, defendant’s brief on appeal fails to address the merits of this assertion. “An appellant’s failure to properly address the merits of his assertion of error constitutes abandonment of the issue.” *Thompson v Thompson*, 261 Mich App 353, 356; 683 NW2d 250 (2004).

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Michael R. Smolenski